UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re	)	
	)	**JUDGE RICHARD L. SPEER**
Linda Lee Vogt	)	
	)	Case No. 01-3010
Debtor(s)	)	
	)	(Related Case: 00-35247)
Linda Lee Vogt	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Sallie Mae Servicing, et al.	)	
	)	
Defendant(s)	)	

MEMORANDUM OPINION AND DECISION

This cause comes before the Court after a Trial on the Plaintiff's Complaint to Determine the Dischargeability of certain Student Loan Obligations owed to the Defendant, Educational Credit Management Corp. None of the other Defendants participated at Trial. At the Trial, the Parties were afforded the opportunity to present evidence and make any arguments that they wished the Court to consider in reaching its decision. The Court has now had the opportunity to review all of the arguments of counsel, the evidence presented at Trial, as well as the entire record of the case. Based upon that review, and for the following reasons, the Court finds that the Plaintiff's repayment of her student loan debts would not impose upon her an "undue hardship," and therefore the loans are nondischargeable pursuant to 11 U.S.C. § 523(a)(8). The Court, however, based upon the equities of the situation, finds that the Plaintiff is entitled to have a portion of her student loan obligations discharged pursuant to this Court's powers under 11 U.S.C. § 105(a).

FACTS

On December 11, 2000, Linda Vogt, the Plaintiff/Debtor in this action (hereinafter referred to as "Debtor"), filed a petition in this Court for relief under Chapter 7 of the United States Bankruptcy Code. In her petition, the Debtor listed Seventy-four Thousand Eight Hundred Fifty-one and 29/100 dollars ($74,851.29) in unsecured debt; included in this list of unsecured debts were certain student loan obligations owed to the Defendant/Creditor, Educational Credit Management Corp. (hereinafter referred to as "Creditor"). Thereafter, on February 6, 2001, the Debtor filed the instant adversary proceeding seeking to discharge her student loan obligations to the Creditor on the basis that the repayment of the debts would impose upon her, as is set forth in § 523(a)(8) of the Bankruptcy Code, an "undue hardship." With respect to this assertion, the following facts were presented to the Court at the Trial held on this matter.

The Debtor is a single female, 48 years of age. At the present time, the Debtor resides with her mother, with whom she shares living expenses. In 1991, the Debtor began to attend school with the goal of becoming a pastor. In 1993, however, the Debtor, during her junior year of college, dropped out of school because of what she describes as a nervous breakdown. During the course of her education, the Debtor amassed a total of Eight student loans, the sum of which equaled Twenty-three Thousand Two Hundred Fifty-six dollars ($23,256.00). However, the Debtor has not made any voluntary payments on these obligations since they first became due, and thus the total amount now owed on these obligations exceeds Thirty-nine Thousand dollars ($39,000.00); of this amount approximately Thirty Thousand dollars ($30,000.00) is owed to Creditor.

With the exception of a failed attempt to return to school in 1995, the Debtor has neither held a job nor been enrolled as a student since 1993. To support herself, the Debtor has in the past relied upon family members for financial support. In addition, the Debtor, beginning in 1996, qualified for Social Security Disability Income. Although recently reduced in amount, the Debtor presently

receives Seven Hundred Fifty-six dollars ($756.00) per month from Social Security; at the present time these funds represent the Debtor's sole source of income. In terms of expenses, the Debtor claims that she currently has One Thousand One Hundred Nine dollars ($1,109.00) in monthly expenditures, the largest of these being Four Hundred Sixty dollars ($460.00) for medical expenses. However, as for how the Debtor is covering this shortfall in her income, no explanation was given.

Concerning the actual essence of her "undue hardship" claim, the Debtor testified that she presently suffers from a mental disability which prevents her from being able to hold a job. In particular, the Debtor testified that she suffers from Bipolar Disorder. Additionally, the Debtor testified that she suffers from a thyroid dysfunction, iron deficiency, and ulcers, all of which she claims are physical symptoms related to her mental disability. Although no medical records or similar evidence corroborating the existence of her mental illness was presented to the Court, the Debtor related to the Court that she is presently receiving medication and counseling for her mental disability.

LAW

11 U.S.C. § 523. Exceptions to discharge.

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> > (8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or non profit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend,
> >
> > > unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependants[.]

11 U.S.C. § 105. Power of court.

> (a) The court may issue any order, process, or judgement that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making and determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

DISCUSSION

The sole issue presented to the Court is whether those student loans incurred by the Debtor may be discharged under bankruptcy law. As resolution of this issue involves the determination as to the dischargeability of a particular debt, this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

As with certain types of other debts, Congress chose to exclude from the scope of a bankruptcy discharge those obligations incurred for the purpose of financing a higher education. 11 U.S.C. § 523(a)(8). This decision was premised on the need to rescue the student loan program from potential insolvency and to also prevent perceived abuses of the bankruptcy process by which students financed their higher education through government guaranteed loans and then shortly thereafter filed to have their debts discharged in bankruptcy. *See Boyd v. U.S. Department of Education (In re Boyd)*, 254 B.R. 399, 403 (Bank. N.D.Ohio 2000). *See also Green v. Sallie Mae Servicing Corp. (In re Green)*, 238 B.R. 727, 723-33 (Bank. N.D.Ohio 1999). Notwithstanding, Congress did allow for the possibility of discharging student loan debts in bankruptcy if the imposition of the obligation(s) would impose "an undue hardship on the debtor and the debtor's dependants[.]" 11 U.S.C. § 523(a)(8).

In enacting § 523(a)(8), however, Congress did not actually define the term "undue hardship," instead leaving this task to the courts. In this regard, this Court, in following those decisions rendered by the Sixth Circuit Court of Appeals,[1] has adopted what has become to be known as the Brunner Test. *In re Green*, 238 B.R. at 733. Under this Test, which is named after the case of *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2nd Cir. 1987), a debtor must establish, by a preponderance of the evidence, the existence of three elements:

> (1) the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans;
>
> (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and
>
> (3) the debtor has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396.

As it applies to the above Test, the Creditor does not dispute the fact that, despite the Debtor's expenses being minimal, the Debtor's current monthly income does not support such expenses. Accordingly, as it pertains to the Brunner Test, only the second and third prongs of the Test are actually at issue. As it concerns her compliance with the second prong of the Brunner Test, the essence of the Debtor's argument centers around the supposed debilitating nature of her mental illness. In particular, the Debtor's argument holds that because her mental illness will likely, for the foreseeable future, prevent her from obtaining employment, additional circumstances exist which indicate that her distressed state of financial affairs will persist for a significant portion of the loan repayment period.

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[1] These case are *Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356 (6th Cir. 1994) and *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433 (6th Cir. 1998).

This Court has held that a mental illness may satisfy the second prong of the Brunner Test if it is sufficiently severe and unlikely to improve. *Swinney v. Academic Financial Services (In re Swinney),* 266 B.R. 800, 805 (Bankr. N.D.Ohio 2001). However, this Court has also held that the mere assertion of a mental illness is insufficient to qualify the Debtor for an "undue hardship" discharge. Instead, any debtor who makes an assertion that a mental illness is causing their distressed state of financial affairs must present substantial credible evidence which supports the existence of the mental illness. *Id*. Although extensive expert testimony is not necessarily required, there must be more than bare allegations that the illness exists. *Id*. In this case, however, aside from her own testimony, the Debtor's only evidence substantiating her claim of a mental illness was a letter from the Social Security Administration stating that her Social Security Disability claim had been renewed. Nonetheless, this letter does not explain why she had qualified for social security benefits nor does the letter give any information about the nature of her claim. Therefore, given the lack of any corroborating evidence supporting the existence of the Debtor's mental illness, the Court cannot find that the Debtor has sustained her burden under the second prong of the Brunner Test.

Additionally, even if the Debtor had sustained her burden under the second prong of the Brunner Test, the Court, for three reasons, cannot find that the Debtor has made a good faith effort to repay her student loan debts as is required under the third prong of the Brunner Test. First, the Debtor has never made any payments on her student loan obligations. *See Berry v. Educational Credit Management Corp. (In re Berry),* 266 B.R. 359, 366-7 (Bankr. N.D.Ohio 2000) (whether debtor makes payments on a student loan obligation is an important factor in determining good faith). Second, the Debtor does not appear to have negotiated in good faith with the Creditor. *Barron v. Texas Guaranteed Student Loan Corporation (In re Barron),* 264 B.R. 833, 842 (Bankr. E.D.Tex. 2001) (factors to be considered under the Brunner Test include whether the debtor made reasonable attempts to negotiate with the creditor). Finally, considering that approximately 75% of the Debtor's unsecured debt consists of student loan obligations, it appears that the Debtor's primary purpose in seeking bankruptcy relief was to discharge her loan obligations. *See In re Boyd*, 254 B.R. at 404 (a

debtor who files bankruptcy for the sole purpose of discharging a student loan obligation may not be acting in good).

Accordingly, for the above reasons, the Court finds that the Debtor has failed to establish her burden under both the second and third prongs of the Brunner Test, and thus the Debtor is not entitled to an "undue hardship" discharge of her student loan obligations. Notwithstanding, the Debtor may still be entitled to enjoy "some of the benefits that bankruptcy brings in the form of relief from oppressive financial circumstances." *In re Hornsby*, 144 F.3d at 440. In particular, this Court, as a court of equity, has the power to fashion an appropriate remedy, including a partial discharge of a student loan debt, under 11 U.S.C. § 105(a). *Id*. at 438-9. *See also In re Cheesman*, 25 F.3d at 360-1.

With this principle in mind, the Court has had the chance to observe the demeanor of the Debtor with respect to the testimony she presented about her present and past difficulties. Based upon these observations, the Court feels that the Debtor has a diminished ability to obtain future employment and thus has significantly diminished expectations of future earnings. As a consequence, the Court believes that it is likely that the Debtor's sole source of income for now and in the foreseeable future will be the Social Security Disability Income. Accordingly, given this state of affairs, the Court feels that the Debtor is entitled to a reduction of the amount of her student loan obligations in order to "enjoy the benefits a bankruptcy provides while still allowing her to satisfy some of her obligation to repay the loans." *In re Boyd*, 254 B.R. at 405. Therefore, in the interest of equity, the Court will reduce the total amount owed on the Debtor's student loan obligations to Seven Thousand dollars ($7,000.00).

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Opinion.

Accordingly, it is

ORDERED that the student loan obligations of the Plaintiff, Linda Vogt, to the Defendant, Educational Credit Management Corp., be, and are hereby, determined to be nondischargeable debts pursuant to 11 U.S.C. § 523(a)(8).

It is ***FURTHER ORDERED*** that the Plaintiff's obligation to the Defendant, Educational Credit Management Corp., be, and is hereby, reduced to Seven Thousand dollars ($7,000.00) pursuant to this Court's equitable powers under 11 U.S.C. § 105(a).

It is ***FURTHER ORDERED*** that the Defendant provide to the Plaintiff an address as to where payments on the Plaintiff's nondischargeable obligation may be tendered.

It is ***FURTHER ORDERED*** that the Plaintiff's minimum monthly payment obligation to the Defendant is hereby determined to be Thirty-eight and 88/100 dollars ($38.88) per month. This obligation will become due on the first day of every month, commencing upon the Defendant's compliance with the above order, and will last until the amount determined nondischargeable herein is paid in full.

Dated:

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Richard L. Speer
United States
Bankruptcy Judge